IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UTICA MUTUAL INSURANCE COMPANY, Plaintiff, v. JAMES PRESGRAVES, and VIRGINIA PRESGRAVES, Defendants.	)	CIVIL ACTION NO. 5:01CV00015 FINDINGS OF FACT AND CONCLUSIONS OF LAW JUDGE JAMES H. MICHAEL, JR.

This is a declaratory judgment action involving claims of arson and material misrepresentations. In its February 22, 2001 complaint, the plaintiff sought a declaration that the insurance contract at issue was void *ab initio* and a judgment against the defendants for reimbursement of $200,730.68, advanced to the defendants as a result of the fire. The defendants counterclaimed and seek $125,269.32 for an outstanding claim for contents. The court conducted a bench trial in this matter on April 22-23, 2002. Having thoroughly considered all of the evidence and testimony as well as the applicable law, the court sets forth below the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Jurisdiction & Venue

The court has original jurisdiction over this action pursuant to 28 U.S.C. §1332. Venue properly lies in the Western District of Virginia pursuant to 28 U.S.C. §1391(a).

Findings of Fact

1. Utica Mutual Insurance Company (the "plaintiff") is a corporation organized under the laws of the State of New York, and is a citizen of a state other than Virginia. (Stipulated Facts of the Parties ("Stip.") ¶ 3.)

2. James Presgraves and Virginia Presgraves, husband and wife, (the "defendants") reside in the state of Virginia. (Stip. ¶ 4.)

3. The defendants are named insureds on a Utica Mutual policy taken out on their Stanley, Virginia home, effective from June 1997 through June 1998. (Stip. ¶ 8.) The defendants were joint owners and joint mortgagors of the premises. (Stip. ¶ 4.) However, by March 1998, only Virginia Presgraves lived in the residence as the defendants had separated but still remained married. (Stip. ¶ 5.) During that time, Virginia Presgraves had a restraining order taken out against her husband. The couples' marriage of some nineteen years had been punctuated by incidents of domestic violence. In addition, in 1999, James Presgraves pled guilty to the felony offense of selling bear galls with a market value in excess of $350. (Stip. ¶ 19.)

4. The insurance contract for the defendants' premises contains the following provision:

> Intentional Loss. We do not provide coverage for an "insured" who commits or directs an act with the intent to cause a loss.

(Insurance Contract, Form NO. 8 HO 00 03 at 4, as modified by Form No. HO 01 45 at 2.) In addition, the contract includes a fraud provision which provides in relevant part:

> Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an "insured" has:
> a. Intentionally concealed or misrepresented any material fact or circumstance;
> b. Engaged in fraudulent conduct; or
> c. Made false statements.

(*Id*. at 17.)

5. The defendants refinanced their house in the fall of 1997. They removed the names of Virginia Presgraves' mother and father off the note and withdrew $25,000 in equity from their house. The refinancing increased their monthly mortgage payment from $1080 to $1450.

6. A fire had broken out at the defendants' Stanley house around 1988. The cause of the fire was determined to be the furnace, and the defendants received payment on their claim based on a different insurance policy, not issued by the plaintiff in this action.

7. In the early morning hours of March 5, 1998, the Stanley Volunteer Fire Department was dispatched to the Presgraves' home after their neighbors reported the house was on fire. (Stip. ¶ 10.)

8. Fire Chief Terry Petit, who responded to the scene of the fire, observed no forced entry, and his team reported to him that the doors were unlocked.

9. The case was referred to the Virginia State Police Arson Investigation Unit which took three samples to test for indications of an incendiary material. Two samples were taken from the dining room floor at the bottom of the stairwell leading to the second floor bedrooms. These samples came back negative for an incendiary substance. The third sample was taken from the basement family room at the base of a television cabinet and this tested positive for gasoline. (Stip. ¶ 11.)

10. The defendant's independent origin and cause expert, Richard Chance, confirmed these results himself by testing samples from the same locations. (Stip. ¶ 12.)

11. The parties have stipulated that the fire was of an incendiary origin. (Stip. ¶ 14.)

12. On the night of the fire, the defendants were not at the Stanley residence. Virginia Presgraves was in Florida with members of her family. No evidence contradicting this is in the record.

13. During March 1998, James Presgraves was in Fredericksburg, Virginia on a job for Archie Dodson, a long-time friend. The particular area, Fredericksburg South, is some one and a half hours drive from Stanley, Virginia. On the night of the fire, two witnesses, Johan Roberts, his roommate in the hotel where the workers were staying, and Archie Dodson, state that they saw the defendant. Mr. Roberts testified that Mr. Presgraves stayed in their room that night, although for some two hours, Mr. Roberts was in another room. Mr. Dodson, meanwhile, testified that he was playing cards with Mr. Presgraves that evening.

14. Mr. Presgraves hitchhiked back to Stanley, Virginia two days after the fire.

15. After having received a thirty day extension from the plaintiff, on July 31, 1998, the defendants submitted a proof of loss to the plaintiff on which they wrote as a total value for contents, approximately $180,000. After Russell Holt, the independent claim adjuster, notified the defendants that the proof of loss had been rejected, the defendants eventually submitted an inventory on January 18, 1999 totaling approximately $140,000. Mr. Holt found on the inventory lists what he believed to be duplications valuing $13050 as well as certain overvaluations. In June 1999, the plaintiffs submitted a revised inventory totaling $130,000. Mr. Holt testified that he still had some questions about the latest revision but at that point, the case was referred to special investigations, and he did no further work on the claim.

16. On February 25, 1999, the plaintiff issued a draft, payable jointly to plaintiffs and IMC Mortgage Company, in the amount of $200,730.68 as an advance payment of defendants' claim. (Stip. ¶ 16.) This left an outstanding amount of $125,269.32 from the revised proof of loss submitted by the defendants.

17. On February 22, 2001, the plaintiff filed suit in this court alleging that the defendants intentionally burned their property and made material misrepresentations relating to their insurance claim. The defendants counterclaimed on March 26, 2001, seeking payment of their outstanding claim for contents.

18. Defendants have not rebuilt the residence damaged by the March 1998 fire. (Stip. ¶ 17.)

II. Conclusions of Law

Under the fraud provision contained in the insurance contract at issue in this case, the fraudulent act of an insured voids the contract, even with respect to an innocent co-insured. *See K&W Builders, Inc. v. Merchants & Business Men Mutual Ins. Co.*, 495 S.E.2d 473, 477 (Va.

1998); *Rockingham Mutual Ins. Co. v. Hummel*, 250 S.E.2d 774, 776 (Va. 1979). A party alleging fraud must prove those allegations by more than an ordinary preponderance of the evidence. The party must present proof that is "clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud, or act in bad faith…." *Virginia Fire & Marine Ins. Co. v. Hogue*, 54 S.E. 8, 11 (Va. 1906). This requires a presentation of clear and convincing evidence of the fraud. *See Mize v. Harford Ins. Co.*, 567 F.Supp. 550, 552 (W.D.Va. 1982) (holding that a fraud allegation must overcome "the presumption that most people are law-abiding citizens").

A. Arson

Keeping in mind that the parties have stipulated that the fire was caused by arson, the plaintiff then must show by clear and convincing evidence both "the opportunity for the commission of, and the motive inducing the arson…." *See Carpenter v. Union Ins. Society of Canto, Ltd.*, 284 F.2d 155, 160 (4th Cir. 1960); *see also Hall v. State Farm Fire & Casualty Co.*, 937 F.2d 210, 216 (5th Cir. 1991). The burden may be met with circumstantial evidence. 284 F.2d at 160*; see also Gregory's Continental Coiffures & Boutique, Inc.*, 536 F.2d 1187, 1191 (7th Cir. 1976). The circumstantial evidence could take the form of, *inter alia*, proof of precarious financial condition, proof of a much smaller inventory than that claimed destroyed, and/or proof that the suspected arsonist was seen around the targeted site. *See Carpenter v. Union Ins. Society of Canton, Ltd.*, 284 F.2d 155 (4th Cir. 1960); *see also Arms v. State Farm Fire & Casualty Co.*, 731 F.2d 1245 (6th Cir. 1984) (considering evidence that an insurance policy was about to expire right after the fire was set). Therefore, in as much as the plaintiff meets its burden in establishing that one or both defendants burned, or caused someone to burn their house, the insurance contract is void and the defendants may not recover.

1. Motive

The plaintiff contends that the evidence shows proof of financial difficulties and of domestic troubles. According to the plaintiff, these two circumstances together make up the motive for setting the fire. Regarding the opportunity to set the fire, the plaintiff appears to suggest that James Presgraves could have done it, or alternatively, that other parties connected to the defendants may be involved.

As for domestic troubles, the couple admit that they were separated at the time of the fire and that a restraining order was in effect against James Presgraves. Conflicting evidence was introduced about certain incidents in the couple's past. Chief Petit recalled an incident where he found Virginia Presgraves doused in gasoline, apparently poured on her by James Presgraves. Another incident recounted by Latisha Bradley involved Mrs. Presgraves getting hit in the head by Mr. Presgraves with a carton of milk. Both these incidents are denied by the Presgraves. Major Russell Montgomery, the Presgraves' brother-in-law, also testified that the couple had problems with domestic violence. While the milk carton and gasoline incidents are contested, it is undisputed that certain other violent acts occurred including some involving Mrs. Presgraves' sister and mother and Mr. Presgraves. The court finds that the evidence reflects that the Presgraves had serious marital problems.

The plaintiff also asserts that the Presgraves were in a precarious financial condition given that their mortgage payments had increased after refinancing and given their monthly expenses. Specifically, plaintiff's witness, Leslie W. Robson, a certified public accountant, did an accounting of the defendants' assets and debts and determined that they had insufficient funds to meet their expenses. Based on this cash flow analysis, (Pl.'s Ex. # 13), Mr. Robson concluded that the defendants were suffering serious financial difficulties. On cross-examination, however, Mr. Robson admitted that Mrs. Presgraves had been making the mortgage payments and that he had no information that any overdrafts had not been paid off. Virginia Presgraves,

meanwhile, explained a rather intricate balancing act of trying to pay off bills with income from her steady job and her home business. The explanation was not implausible. The court believes that the Presgraves family lived month to month trying to make ends meet, however, the plaintiff fails to prove the existence of a dire financial predicament.

Thus, the court acknowledges that the plaintiff has demonstrated the existence of domestic problems and of some financial problems in the Presgraves household. In addition, the parties each presented their own experts. Testifying for the plaintiff, Richard Chance provided his expert opinion that the fact that the defendants were not home at the time of the fire, that the some of the contents were allegedly missing, that the family's four cats were not in the house at the time of the fire, as well as the fact of the refinancing and the domestic violence, all lead him to conclude that this was arson for profit. Meanwhile, Ronald Hiceshew, the defense expert, admits these are all considerations to take into account in an arson investigation, but he emphasizes the lack of evidence putting the defendants, or anybody else connected to this case, at the scene of the fire. Thus, he concludes that while this is a case of arson, as there is no question that the fire was intentionally set, the evidence does not show that it was the defendants who were responsible.

Chief Petit testified that based on his years of experience, he felt that there was not as much furniture in the house as there should have been. It also came out at trial that the Presgraves' wedding album and a tanning bed had been moved from the house before the fire. In response, the defendants stated that there was furniture in the house. Indeed, the photos of the scene (Pl.'s Ex. # 10) do not depict an empty house; rather, the bedroom was furnished as was a study. In addition, Chief Petit admitted that the fire could have destroyed some furniture. As for clothing, some of Mrs. Presgraves' items are visible in the photos of the aftermath of the fire. (Pl.'s Ex. # 10.) The absence of much of Mr. Presgraves's items has been explained by

the fact that he had moved out of the house before this time. Much reference was made to a tanning bed which had been removed from the premises before the fire. Virginia Presgraves testified that it was sold to her mother, Vada Cubbage, a fact supported by her mother's testimony. Conflicting evidence was introduced regarding the wedding album which, it is undisputed, is now at Vada Cubbage's house. Mrs. Presgraves testified that she had brought it over there years earlier, fearing that Mr. Presgraves would destroy it during one of their fights. Mrs. Cubbage recalled that she had taken it years earlier to get pictures made, and it stayed in her house since that time. While their recollections are different, the result is the same in that the wedding album was at the home of Mrs. Cubbage. Thus, the defendants have offered explanations for all these circumstances presented by the plaintiff.

The plaintiff emphasized throughout the witness examinations and in argument that the defendants had brought up the fire which had occurred about ten years earlier in their house to the investigators of the March 1999 fire. The court does not consider it suspicious that a family who had suffered an earlier fire which also apparently started on the same floor would raise this with investigators.

According to the plaintiff, another suspicious circumstance is that the Presgraves' four cats were outside at the time of the fire. Mrs. Presgraves states that they were outdoor cats.

Other circumstances which the plaintiff brought out include the fact that James Presgraves had torn down and burned his mountain cabin/shack and that there were improbabilities in the defendants' statements concerning who had keys to the premises. As for the cabin, referred to at trial as "Morning Star," there is no dispute that James Presgraves demolished it and set it on fire. The evidence, however, indicated that this was a run down mountain shack that was probably past its prime. No suggestion was made that any insurance benefits were ever claimed or even possible to be obtained. The court is not inclined to believe that it reflects a pattern of

arson on behalf of Mr. Presgraves.

As for who had keys to the premises, James Presgraves testified that he never had a key. Virginia Presgraves stated that she and maybe her sister had a key. Mrs. Presgraves also explained that the garage entrance had a keypad entry installed, thus an actual key was unnecessary. Again, this is a suspicious circumstance raised by the plaintiff which was met with an explanation from the defendants.

What the court is then left with is the undisputed fact that the defendants' marriage had serious problems, some involving violence, and that they had to stretch their income to cover their monthly expenses.

2. Opportunity

Two witnesses testified that James Presgraves was in Fredericksburg the night of the fire. Johan Roberts stated that Mr. Presgraves went to sleep early that night, and that he was in the room in the morning when Mr. Presgraves found out about the blaze. Archie Dodson, the employer and close friend of Mr. Presgraves, stated on cross examination that he and the defendant had played cards that evening. The court recognizes the inconsistency in this testimony, that is, was Mr. Presgraves alone and asleep in his room, or was he playing cards with Mr. Dodson. The two witnesses were consistent in their testimony that Mr. Presgraves did not have his car with him at that time, and that he hitchhiked back to Stanley two days after the fire. The court does not consider this to be very strong alibi evidence given these inconsistencies and given the long-time friendship between Mr. Dodson and Mr. Presgraves. However, the court must ask if there is clear and convincing evidence that this alibi is false. The answer is that there is not. No evidence was introduced to contradict the witnesses' statements concerning the defendant's lack of a car. Nothing in the record suggests that Mr. Presgraves was in Stanley that night, other than the plaintiff's inference that he snuck out of Fredericksburg to set the fire.

To reiterate, the court operates under the "general and reasonable presumption that men are honest and do not ordinarily commit fraud," *see Hogue*, 54 S.E. at 11. The fact that Mr. Presgraves was previously convicted of a felony is a factor for the court to consider, but it alone does not trump this presumption. Therefore, the plaintiff must provide more than the suggestion that Mr. Presgraves was not in Fredericksburg.

Concerning the possibility that another person caused the fire, on behalf of the defendants, the plaintiff suggested that either Steve Cubbage, the brother of Virginia Presgraves, or John O'Donnell, a friend of James Presgraves, may have done it. The plaintiff's evidence with regard to Mr. Cubbage is that he had no alibi as he testified that he was at his parents' house the night of the fire, but that nobody saw him there. In addition, Mr. Cubbage admitted that he is a convicted felon. Chief Petit also testified that Mr. Cubbage had been called to come to the scene of the fire and that his demeanor was calm when he arrived. While this is evidence that goes to whether Mr. Cubbage had an opportunity to set the fire, it is far from sufficient to find that the Presgraves conspired with Mr. Cubbage to cause the fire. While there is nobody who testified that Mr. Cubbage was at home that evening, there is nobody who has testified that he was not. The court points out that even if any evidence existed to link him to setting the fire, the record reflects that a family feud of sorts had erupted between the families, and it is not certain that Mr. Cubbage could be said to have caused the fire for the Presgraves' benefit.

As for Mr. O'Donnell, the court is tempted to discount his testimony entirely. He did not impress the court as a reliable witness. Indeed, his girlfriend, Latisha Bradley, painted a picture of Mr. O'Donnell as a chronic liar and criminal. The court credits her testimony as there was little in Mr. O'Donnell's testimony that was consistent with previous statements he had made or with the recollections of others who testified. Nevertheless, the plaintiff asserts that he could have set the fire. The court finds nothing in the record to credit this bold assertion beyond

the fact that he was friends with James Presgraves.

3. Conclusion

It is true that circumstantial evidence may be used to prove arson. The plaintiff has presented numerous circumstances which it argues raises lots of suspicion. The court, however, notes that "lots of suspicion" is not the burden of proof which the plaintiff must meet; rather, for the court to find that the defendants committed arson for profit, there must be clear and convincing evidence in the record. The court cannot discard what it considers to be reasonable explanations for some of the circumstances raised by the plaintiff. In addition, the court finds that the plaintiff failed to provide the necessary proof that would lead this court to conclude that James Presgraves was responsible for the act itself, or that he or his wife had caused someone else to do it. Merely asserting that a person has no alibi is not clear and convincing evidence that he committed the act.

It is the sum of circumstances that must be examined. In finding the insured responsible for arson in *Carpenter*, the Fourth Circuit considered evidence of a precarious financial condition and a claim for a larger inventory than was actually destroyed. However, it also considered evidence that the suspect was seen at the premises at the time of the fire and that he was hovering about the plant which was burned about ten minutes before the fire was discovered. In *Arms*, the Sixth Circuit looked to evidence of financial difficulties and the incendiary origin of the fire, but also weighed evidence that showed that two fires broke out within nine days of each other which caused a total loss of the property and that an insurance policy was about to expire.

Here, the court has evidence of domestic problems and financial problems, but those other circumstances, which in *Carpenter* entailed putting the suspect at the scene, or in *Arms*, involved two fires within days of each other and the imminent expiration of the insurance

policy, are lacking in this case. For example, no evidence puts anybody at the scene of the fire, or even suggests that someone was there. The circumstances surrounding the cats, the keys and the clothes received explanations from the defendants. Thus, the plaintiff lacks strong evidence, and the variety of weak evidence which it has put before the court is insufficient to make its case. Accordingly, the court cannot find that the plaintiff has presented clear and convincing evidence that the defendants caused, or had someone cause, their residence to be burned. The plaintiff has failed to prove its claim of intentional burning of property.

B. Material Misrepresentations

Under Virginia law, an insured violates the fraud provision of a fire insurance policy if he or she makes a false statement concerning some fact material to the policy or to a claim under the policy. *United States Fidelity and Guarantee Co. v. Haywood*, 177 S.E.2d 530, 533 (Va. 1970). Such a violation results in a forfeiture of rights to recover under the insurance policy. *See C.C. Vaughn & Co. v. Virginia Fire & Mutual Ins. Co.*, 46 S.E. 692, 694 (Va. 1904). A material misrepresentation in the submission of a claim is one that "might have affected the attitude and action" of the insurance company, or was "calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate." *Fine v. Bellefonte Underwriters Ins.*, 725 F.2d 179, 184 (2d Cir. 1984). Such a misrepresentation must also be made with the intent to deceive or defraud. *See Globe & Rutgers Fire Ins. Co. v. Stallard,* 68 F.2d 237, 240 (4th Cir. 1934); *see also Lykos v. American Home Ins. Co*,.609 F.2d 314, 316 (7th Cir. 1979).

The plaintiff maintains that the submission of the proof of loss on July 31, 1998 for $180,000 constitutes a material misrepresentation, as well as the duplications and overvaluations which appeared on the inventory lists. The defendants maintain that they filled out the forms

to the best of their ability with no intent to list something incorrectly.

The plaintiff correctly asserts that a material misrepresentation as to the value of an insurance claim will void the claim and the entire policy. However, the plaintiff erroneously maintains that a material misrepresentation can be found even if it was unintentional. The plaintiff cites to *Lykos v. American Home Ins. Co.*, 609 F.2d 314 (7th Cir. 1979), for this proposition. The *Lykos* court did not find that the misrepresentations involved in that case were unintentional. Instead, the court found that the insureds knowingly exaggerated their claim "with an eye to settling." *Id*. at 316. The Seventh Circuit held that the making of mere estimates "to gain a position of advantage in the settlement of the loss … is a fraudulent design." *Id*. Another case cited by the plaintiff, *Robert Chase d/b/a Richmond Automotive Machine v. CNA Ins. Co. and Continental Casualty Co.*, Civil Action No. 89-00551-R (E.D.Va. Feb. 28, 1990), clearly states that a false statement "causes a forfeiture … only if the statement was both intentional and material."

Plaintiff's witness Holt, the independent claims adjuster, testified that he received the proof of loss form from the defendants only one week after he informed them that their thirty day extension was coming to an end. It included a demand for $225,000 for the dwelling and "app. $180,000" for the contents. (Pl.'s Ex. #7.) The abbreviation "app." stood for approximately. Holt also stated that he was surprised to get the form so quickly, and noted it was unaccompanied by an inventory. After the denial of their proof of loss, (Pl.'s Ex. # 9.), the defendants submitted an inventory totaling some $140,000. The plaintiff contends that the reduction of the amount for contents in the latter inventory makes the amount listed in the proof of loss a material misrepresentation, and therefore, a false statement that would void the insurance policy. The court rejects this argument.

Cross examination of Virginia Presgraves demonstrated that she had little understanding

of the nature of a sworn statement of proof of loss. In addition, Mrs. Presgraves testified that she believed it necessary to submit the most basic information to the insurance company at that time, and as she did not know exactly what the contents value would be, she wrote "app." next to the number. Thus, it was not until she did finally list all the items and their respective values on an inventory sheet that she reached the result of some $140,000.

The use of "approximately" severely weakens the plaintiff's argument here. So too does the statement of Mr. Holt that he was surprised that the proof of loss could come back after only a week which suggests little time was put into filling it out, a fact supported by the lack of any inventory attachments. The court does not excuse the defendants' failure to comply with the deadlines in effect under the policy, and recognizes that the need for haste was their own doing, however, the lack of sophistication demonstrated by Mrs. Presgraves in this matter coupled with the use of an approximate value leads this court to conclude that this form was not submitted with the intent to deceive or defraud.

As for the duplications and overvaluations on the inventory, (Pl.'s Ex. # 22), Mr. Holt testified that he found duplications valued at approximately $13,000 and overvaluations including a night vision scope valued at $2800, black powder equipment valued at $5000 and a refrigerator for $2200. After requesting a revision on certain items that were priced suspiciously high, the defendants returned an amended inventory where in some cases, the number of items was increased, but the price stayed the same. This includes the most dramatic increase of the number of baseball cards lost in the fire from 500 on the original inventory to 28,000 on the revised inventory.

The defendants noted that the inventory list was typed up by the sister of Virginia Presgraves. They suggest that the price for the black powder equipment was intended to be $500 and not $5,000, and that a typographical error is likely responsible. The fact that the list

was composed at various times by both Virginia Presgraves and her sister, with some input from James Presgraves, also accounts, according to the defendants, for the duplications. As for the refrigerator, Mrs. Presgraves admits to guessing at the price and suggests she could have done better. Mr. Presgraves, meanwhile, suggested that the actual price was greater. And on the issue of baseball cards, Mrs. Presgraves stated that she had asked her son for this information. It is true that the entry which is hardest to credit is the one concerning baseball cards, but the court is not willing to void an entire insurance policy due to a representation concerning the number of baseball cards destroyed in the fire. The court found Mrs. Presgraves to be a credible witness when she discussed the difficulties of composing the inventory and recalling exactly what their possessions were. The plaintiff has pointed out inaccuracies in the inventory, and exaggeration, certainly with respect to the baseball cards, but the court does not find that they reflect a fraudulent design on the part of the defendants.

Accordingly, the court finds that the evidence does not establish material misrepresentations made with the intent to deceive or defraud. The plaintiff, therefore, failed to prove Count II of its complaint.

III. Defendants' Counterclaim

The defendants counterclaimed for the amount of $125,269.32, as they represent that a claim of loss was submitted for $326,000, (Pl.'s Ex. # 12), and the plaintiff has so far paid to defendants $200,730.68 for the dwelling. During the testimony of Russell Holt, the independent claims adjuster, counsel for the plaintiff indicated that this amount, of $125,269.32 had been stipulated to by counsel. (Tr. II at 41.)[*] The court notes that this stipulation was not one of those submitted in writing to the court, however, it accepts the representation made by counsel

[*] The court notes that "Tr.II" refers to the transcript for the second day of the bench trial, as the version of the transcript provided to the court was in two parts. The first was for day one of the trial, and the second part covered day two.

in open court.

As the court has found that the plaintiff has failed to prove arson or material misrepresentations which would void the defendants' insurance policy, the court finds that the defendants should recover the amount of the stipulated loss, to-wit, $125,269.32 plus interest at the rate of nine (9) percent per annum until paid. The interest rate is in accordance with VA. CODE ANN. § 6.1-330.54.

IV. Conclusion

For the foregoing reasons, the court finds that the plaintiff has failed to prove Counts I and II of its complaint, and is therefore, not entitled to reimbursement of the funds already paid out to the defendants under the insurance policy. Accordingly, the defendants counterclaim shall be granted, and the plaintiff is ordered to pay $125,269.32 plus applicable interest.

A separate judgment will be entered pursuant to Federal Rule of Civil Procedure 58 in accordance with the foregoing findings of fact and conclusions of law.

ENTERED: _____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UTICA MUTUAL INSURANCE COMPANY, Plaintiff, v. JAMES PRESGRAVES, and VIRGINIA PRESGRAVES, Defendants.	)	CIVIL ACTION NO. 5:01CV00015 FINAL ORDER AND JUDGMENT JUDGE JAMES H. MICHAEL, JR.

Pursuant to Federal Rule of Civil Procedure 58, and in accordance with the accompanying Findings of Fact and Conclusions of Law, it is this day

ADJUDGED, ORDERED, and DECREED

as follows:

(1) that the plaintiff shall pay to the defendants $125,269.32 plus interest at the rate of nine (9) percent per annum until paid; and

(2) that final judgment be, and it hereby is, entered in favor of the DEFENDANTS.

The Clerk of the Court hereby is directed to strike this case from the docket of the court, and to send a certified copy of this order and the accompanying Findings of Fact and Conclusions of Law to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date